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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-76

HARPER WILLIAMS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Harper Williams hereby petitions this Honorable Court for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Seventh Circuit affirming the District Court's judgment of conviction on an indictment charging him in one count with conspiracy, Title 18, United States Code, Section 371, to unlawfully and with fradulent intent, transport and cause to be transported in interstate commerce falsely

made and forged securities, knowing the same to be falsely made and forged in violation of Title 18, United States Code, Section 2314.

## OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet officially reported, but it is reproduced herein in Appendix "A" to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 14, 1974. A Petition for Rehearing was subsequently filed with the Seventh Circuit Court of Appeals. The Petition for Rehearing was denied on July 11, 1974, a copy of which decision is appended as Appendix B. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254 (1).

## QUESTIONS PRESENTED

1. Was there sufficient independent proof connecting the defendant with the conspiracy to render the extra-judicial declarations of the co-conspirators, made out of the presence of the defendant, admissible against him.

## STATUTES INVOLVED

Title 18, United States Code, Section 2314:

> "Transportation of stolen goods, securities, moneys, fradulent State tax stamps, or articles used in counterfeiting
>
> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities, or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fradulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fradulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or,

Whoever, with unlawful or fradulent intent, transports in interstate or foreign commerce, any traveler's checks bearing a forged countersignature; or,

Whoever, with unlawful or fradulent intent, transports in interstate or foreign commerce, any tool, implement or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof –

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

As amended May 24, 1949, c.139, §45, 63 Stat. 96; July 9, 1956, c.519, 70 Stat. 507; Oct 4, 1961, Pub.L. 87-371, §2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90-535, 82 Stat 885.

Title 18, United States Code, Section 371:

"Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

## STATEMENT

This petition seeks issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment of June 14, 1974 affirming the judgment of conviction against petitioner in the United States District Court for the Southern District of Indiana, on the 15th day of September, 1973, after a jury trial on a one count indictment, number IP 73 CR 45, charging petitioner with conspiracy under Section 371 of Title 18, United States Code, to violate the provisions of Section 2314 of Title 18, United States Code, dealing with the interstate transportation of falsely made or forged securities.

The evidence against the petitioner consisted chiefly of the testimony of two female persons who were indicted as co-conspirators. One of these witnesses, the government had dismissed the indictment against after a

motion to suppress had been sustained and the other had pled guilty to the charge. The testimony of these two witnesses consisted almost entirely of conversations with a male person who had been indicted as a co-conspirator and who also had pled guilty to the charge. These conversations all took place out of the presence of the petitioner. This testimony was admitted into evidence over objection of petitioner's counsel. The only evidence of a non-hearsay nature given by these witnesses was of a meeting between the male co-conspirator and another man said to have been petitioner and visits to petitioner's house on two different occasions by each of the female witnesses and the male co-conspirator. The male co-conspirator who was a party to these conversations, the meeting between himself and a man alleged to have been petitioner and the two visits to the petitioner's house at different times with each of the other female witnesses, had been subpoenaed as a witness for the government but was not called to corroborate the two female witnesses' testimony, but instead he testified as a defense witness. His testimony was that he received the stolen money orders from the petitioner's brother, who closely resembled petitioner.

## REASONS FOR GRANTING THE WRIT

1. There is a conflict between the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals on the question of how much independent proof of a defendant's connection with a conspiracy is needed before the extra-judicial declarations of a co-conspirator made out of the presence of the defendant can be admitted into evidence against him.

2. The decision of the Seventh Circuit Court of Appeals in this case conflicts with the general principle of law as

set down in this Court that a defendant cannot be connected with a conspiracy solely by declarations made in his absence by an alleged co-conspirator.

## ARGUMENT

The decision of the Court of Appeals for the Seventh Circuit below (see Appendix to this petition) that there was sufficient non-hearsay evidence to connect the petitioner with the conspiracy to allow the extra-judicial declarations of the co-conspirators admitted into evidence against him is directly contrary to the decision of the Fifth Circuit Court of Appeals in the case of *Panci v. United States*, 256 F.2d 308 (1958) which is substantially indistinguishable with this case. The Court in that case held that the independent proof although circumstantial in nature must be such that the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilty. The Seventh Circuit Court of Appeals in this case has held that the independent evidence connecting a defendant with a conspiracy must only support an inference of guilt.

Such decision not only conflicts with the rule established by the Fifth Circuit in the *Panci* case, supra, but tends to lessen the degree of proof necessary to convict a defendant in a conspiracy case. It allows the government to convict a person of conspiracy to commit a crime upon proof that is not sufficient to convict the same person of the crime he was conspiring to commit. Such decision brings out or illustrates the very evils of the exception to the hearsay rule and the conspiracy charge; such decision if let stand unmolested opens a Pandora's box of opportunities for unscrupulous defendant to use their conversations with other defendants alone as a bargaining tool to convict innocent third parties while they

themselves gain the benefits of "plea bargaining" to save their own skins at others expense. It would undermine the general principle set down by this Court that a defendant cannot be connected with a conspiracy solely by the extra-judicial declarations of a co-conspirator made in his absence.

## CONCLUSION

For the reasons above stated, petitioner respectfully urges a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Seventh Circuit and on granting of the writ that the judgment be reversed and the case remanded with directions to enter a judgment of acquittal or for a new trial.

Respectfully submitted,

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*Attorney for Petitioner.*

## APPENDIX A

Not to be cited,
per Circuit Rule 28

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

(Argued April 18, 1974)

June 14, 1974

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No 73-2106 vs.

HARPER WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. IP 73 CR 45

Cale J. Holder, Judge.

ORDER

This appeal questions whether there is sufficient evidence[1] to sustain the verdict rendered by the jury against the appellant on a charge of conspiring to cause the interstate transportation of forged or altered money orders.[2]

[1] We are obliged, of course, to view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80.

[2] 18 U.S.C. §§ 371 and 2314.

We conclude that it was, and, accordingly, affirm the judgment of the district court. [3]

We do not understand the appellant to contend that there existed no conspiracy to negotiate in Indiana forged money orders which were the fruit of the theft of blank money orders in Michigan. Nor, in view of his citation of *Panci v. United States*, 256 F.2d 308 (5th Cir. 1958), do we understand him to challenge the rule that the out-of-court declarations of one conspirator are admissible against another co-conspirator, even if made outside his presence, if made in furtherance of the objects of the conspiracy, and during its existence. [4]

Rather, relying upon the principle that a conspiracy cannot be inferred by mere association, *United States v. Hickey*, 360 F.2d 127, 139 (7th Cir. 1966), he contends that there is insufficient non-hearsay evidence to connect him with the conspiracy. [5]

The government introduced the testimony of Jane Wray Brann, a co-conspirator against whom the indictment had been dismissed. She testified that on November 28, 1972, she met James Johnson and Keith Johnson at the corner of Willard and Hackley in Muncie, Indiana [6]

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[3]Since we have decided to dispose of this appeal by unpublished order, pursuant to Circuit Rule 28, we set forth only those facts necessary to our judgment.

[4]See 256 F.2d at 311, where the court relied upon *Logan v. United States*, 144 U.S. 263, 308-309.

[5]"It is axiomatic that such [extra-judicial] declarations and acts of a co-conspirator may not be admitted into evidence against a defendant absent independent evidence establishing his participation in the conspiracy." *United States v. Cerone*, 452 F.2d 274, 283 (7th Cir 1971).

[6]Tr. 132-133

and discussed making some "easy money."[7] The next morning, while driving down the street, she saw James Johnson and Keith Johnson walking down the street.[8] They drove to a house where a man whom the witness identified as the appellant[9] was getting into his car. The two men went to talk to the appellant. The witness described the conversation, and what happened when her two companions returned to the car, as follows:

A "Keith would say something and kind of shuffle around a little bit, use hand gestures; and then the man would just kind of, you know, nod and not say much; and Keith would talk again and use more hand gestures and shake his head and do things like that; and the man acted like he was thinking. And that was the general gist of what went on.

Q Did there come a time they came back to the car? [sic]

A Yes, sir.

Q Who came to the car?

A Keith and Jimmy.

Q Did they have anything with them?

A Yes, sir

Q What?

A Three money orders." Tr. 143.

Although Brann testified that she saw nothing exchanged between the three men,[10] she did testify that, immed-

[7] Tr. 137.

[8] Tr. 139.

[9] Tr. 160.

[10] Tr. 160.

iately after the conversation, she drove the two men to a residence in Muncie at which her two companions "filled out the checks." [11] We think that the jury permissibly could infer, from this juxtaposition of circumstances, that the appellant had supplied the three traveller's checks.

The testimony of Maxine Hilligoss tended to corroborate the inference from Brann's testimony that the appellant's role in the conspiracy was to supply blank money orders. She testified that she picked up Keith Johnson who said that he wanted to go to acquire more money orders, that they drove to appellant's home, that Johnson went into the house and emerged with four blank money orders which he showed her. [12]

The jury was not obliged to believe that the money orders both Brann and Hilligoss saw had been obtained from the appellant; we think, however, that they were entitled to do so. The evidence offered was circumstantial evidence of acts connecting the appellant with the conspiracy. It was sufficient.

The judgment of the district court is therefore

AFFIRMED.

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[11] Tr. 146-147.

[12] Tr. 318-320.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 11, 1974

Before

Hon. John Paul Stevens, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 73-2106 vs.
HARPER WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 73 CR 45)

This matter comes before the Court on appellant's motion to file his petition for rehearing instanter. The Court, having noted that the petition accompanying the motion was not timely filed – but at the same time having examined the contents of said petition for rehearing in the interests of justice and finding it to be without merit – directs the Clerk of the Court to enter an order DENYING the motion for leave to file said petition instanter. Said motion is hereby DENIED.

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-76

HARPER WILLIAMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner alleges that there was insufficient independent proof connecting him with the conspiracy to justify the admission against him of extra-judicial declarations of a co-conspirator.

After a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on one count of conspiring to transport forged or altered securities (money orders) in interstate commerce in violation of 18 U.S.C. 371 and 2314. He was sentenced to a term of three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioner conspired with at least ten others to pass altered money orders in the Muncie, Indiana, area. Under the plan, money orders which had been stolen from a Detroit, Michigan, business were

transported to Indiana. The money orders were then imprinted with a monetary amount and distributed to other conspirators who would negotiate them. Petitioner acted as a conduit in the conspiracy: he received stolen money orders and distributed them to fellow co-conspirators who cashed them. The government's evidence against petitioner consisted of the testimony of two of the participants in the conspiracy.

Jane Wray Brann testified that on the evening of November 28, 1972, she met with James Johnson and Keith Johnson and discussed making some easy money (Tr. 137). The following morning Miss Brann again met James Johnson and Keith Johnson and drove them to a house where petitioner was getting into his car (Tr. 141, 160). The two men got out of Brann's car and approached petitioner (Tr. 141-142). The witness described the conversation that followed and what occurred when her two companions returned to her car (Tr. 143):

> A. Keith would say something and kind of shuffle around a little bit, use hand gestures; and then the man would just kind of, you know, nod and not say much; and Keith would talk again and use more hand gestures and shake his head and do things like that; and the man acted like he was thinking. And that was the general gist of what went on.
>
> Q. Did there come a time they came back to the car? [*sic*]
>
> A. Yes, sir.
>
> Q. Who came to the car?
>
> A. Keith and Jimmy.
>
> Q. Did they have anything with them?

A. Yes, sir.

Q. What?

A. Three money orders.

Although Brann admitted that she had not seen the actual exchange of the money orders (Tr. 168-169), she testified that the first occasion on which she saw any of the money orders followed her companions' return to the car (Tr. 169-170). Immediately after the conversation, the two men filled out the money orders, and Brann negotiated them (Tr. 147-148).

Carol Maxine Hilligoss testified that on December 18, 1972, she picked up Keith Johnson, and the two went to obtain more money orders. Johnson directed her to drive to petitioner's house (Tr. 318-319). Mrs. Hilligoss testified as follows (Tr. 320):

Q. Well, did anything happen when you and Keith Albert Johnson reached Grass's [petitioner's nickname] house?

A. He went in for a minute. When he came out, he said he then had the other money orders.

Q. He said?

A. Said that's where he got the money orders; then he had the others.

Q. How many did he have, do you know?

A. Four.

Q. Did you see them at that time, Mrs. Hilligoss?

A. Yes.

After leaving petitioner's house, Keith Johnson filled out the money orders and Hilligoss cashed them (Tr. 321-322).

Petitioner contends that there was insufficient evidence connecting him with the conspiracy to justify the admission against him of the extra-judicial declarations of co-conspirator Keith Johnson. The testimony of Jane Brann and Carol Hilligoss, however, furnished sufficient independent proof of petitioner's participation in the conspiracy as a supplier of blank money orders. On the basis of that testimony, exclusive of Keith Johnson's statements, a jury could reasonably conclude beyond a reasonable doubt that James Johnson and Keith Johnson obtained blank, stolen money orders from petitioner.[1] A conspiracy to distribute altered money orders having been established, and petitioner's participation in the conspiracy haveing been shown independent of the hearsay declarations, Keith Johnson's statements were properly admitted against petitioner under the co-conspirator exception to the hearsay rule. See *Glasser* v. *United States*, 315 U.S. 60, 74.

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[1]There appears to be disagreement among the courts of appeals concerning the proper standard for admissibility of conspirator statements. Compare *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028; *United States* v. *Bey*, 437 F. 2d 188 (C.A. 3); and *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 3), certiorari denied, 377 U.S. 953, with *United States* v. *Martinez*, 466 F. 2d 679 (C.A. 5); *United States* v. *Morton*, 483 F. 2d 573 (C.A. 8); and *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9). There is no need to resolve the disagreement in this case, however, because the independent evidence satisfied even the most stringent of the standards.

In *Panci* v. *United States*, 256 F. 2d 308 (C.A. 5), on which petitioner relies (Pet. 6), the non-hearsay evidence failed to establish the defendant's connection with a conspiracy to violate the narcotics laws. Unlike the situation in the present case, where the evidence exclusive of the hearsay showed that petitioner distributed the money orders to his co-conspirators, there was no testimony in *Panci* that the paper bag the defendant was seen giving to one of the conspirators contained narcotics. The court of appeals in *Panci* thus concluded that the non-hearsay testimony "was wholly insufficient to establish guilt" (256 F. 2d at 312).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

OCTOBER 1974.

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[2]The court in *Panci* stated in dictum that "in * * * circumstantial evidence cases * * * the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt" (256 F. 2d at 312). Even assuming that the non-hearsay evidence must satisfy a "reasonable doubt" rather than a "preponderance of the evidence" test to warrant the admission of a co-conspirator's hearsay statements (but see note 1, *supra*), the reasonable doubt standard does not require that the evidence exclude all hypotheses inconsistent with guilt. This court held in *Holland* v. *United States*, 348 U.S. 121, that "where the jury is properly instructed on the standards for reasonable doubt," it would be "confusing and incorrect" to give a further instruction that "where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt" (348 U.S. at 139-140).